APPENDIX

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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Master Consolidated
Number C 81-4365 DLJ

No. C 89-4030 DLJ

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,
a Delaware corporation,

Plaintiff,

vs.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA; COUNTIES OF: ALAMEDA; CONTRA COSTA; FRESNO; KERN; KINGS; LOS ANGELES; MADERA; MERCED; ORANGE; RIVERSIDE; SAN BERNARDINO; SAN DIEGO; SAN FRANCISCO; SAN JOAQUIN; STANISLAUS; TULARE,

Defendants.

STIPULATED ORDER FOR PRELIMINARY INJUNCTION AS TO 1993 TAXES OF THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY

Pursuant to stipulation and without waiver of rights by any party with respect to any permanent injunction requested by plaintiff in this action, and subject to plaintiff's compliance with the security provisions set forth in paragraph 7,

IT IS HEREBY ORDERED THAT:

1. With respect to those rail transportation properties which were valued by the defendant Board on a nonunitary basis and identified by property class codes 891, 892, and 893, other than class code 891 and 892 property leased and solely used by Amtrak, and for which the defendant Board has afforded or affords plaintiff some assessment ratio relief by assessing 1993 *ad valorem* property taxes at a 74.93% ratio, the defendants, their agents, servants, employees and attorneys, and all persons acting for or in concert or in participation with them be, and hereby are, restrained and enjoined pending the determination of this action, or further order of this Court, from collecting or seeking to collect any portion of the ad valorem taxes billed for the 1993 tax year. Any disagreement which the parties cannot resolve concerning the property afforded relief pursuant to this paragraph shall be brought to the court's attention and shall be resolved by further Order of this Court.

2. Plaintiff in this action, in the absence of an intervening order of this Court, shall pay for the 1993 tax year 0.0% of the *ad valorem* taxes levied on its rail transportation properties which are described in the preceding Paragraph 1. Plaintiff may retain 100.0% of the taxes billed against such property for the 1993 tax year with respect to such properties.

3. Defendants, their agents, servants, employees and attorneys, and all persons acting for or in concert or in participation with them be, and hereby are, restrained and enjoined pending the determination of this action, or further order of this Court, from collecting or seeking to collect more than 79.5% of the *ad valorem* taxes billed on Plaintiff's rail transportation property valued by the Board as a unit for the 1993 tax year and on all re-

maining nonunitary property for which the defendant Board has afforded or affords plaintiff some assessment ratio relief by assessing 1993 *ad valorem* property taxes at a 74.93% ratio, including nonunitary property in class codes 11, 12, 41, 42, 43 and all class code 891 and 892 property leased and solely used by Amtrak.

4. Plaintiff in this action, in the absence of an intervening order of this Court, shall pay for the 1993 tax year 79.5% of the *ad valorem* taxes levied on its rail transportation properties which are described in the preceding paragraph 3. Plaintiff may retain the remaining 20.5% of the taxes billed against such property for the 1993 tax year with respect to such properties.

5. Pending the determination of this action or further order of this Court, defendants, their servants, employees, agents, attorneys and all persons acting for, or in concert, or in participation with them, shall be and hereby are, restrained and enjoined from recording any tax lien or any other form of encumbrance on the property of the plaintiff in this action or initiating any other enforcement proceedings as a result of such plaintiff's failure to pay the percentage of *ad valorem* taxes enjoined by this Order.

6. Pending the determination of this action or further order of this Court, defendants, their servants, employees, agents, attorneys, and all persons acting for or in concert or in participation with them, shall accept payments in the amount specified in the preceding Paragraphs 1 through 4 as full payment of the *ad valorem* property taxes assessed on the rail transportation property of plaintiff in this action and shall be restrained and enjoined from imposing any penalty on such plaintiff or its property as a result of the plaintiff's failure to pay the percentage of *ad valorem* taxes enjoined by this Order.

7. On or before December 10, 1993, plaintiff shall secure payment of the *ad valorem* taxes enjoined herein by providing security for the taxes at issue, or for any taxes that are ultimately adjudged to be due, by providing to defendants one of the following:

a. A verified financial statement establishing sufficient net worth to pay the taxes at issue, or the taxes ultimately adjudged to be due; or

b. A letter of credit satisfactory to the defendants for the taxes at issue or the taxes ultimately adjudged to be due.

Any disagreement concerning the form or sufficiency of the security which the parties cannot resolve shall be brought to the Court's attention and resolved by further order of the Court.

8. This order is without prejudice to the right of any party to move for a modification or termination of this order on the basis of any admissible evidence or argument without regard to whether such evidence was or could have been presented at or before the hearing of the matter.

ORDERED on the 2nd day of December, 1993 and executed this 2nd day of December, 1993.

/s/ D. Lowell Jensen
D. LOWELL JENSEN
Judge,
United States District Court

APPROVED AS TO FORM:

/s/ Robert E. Murphy
ROBERT E. MURPHY
Deputy Attorney General
Attorney for Defendants
State Board of Equalization
of the State of California

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C 89-4030 DLJ

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,

Plaintiff,

v.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA; COUNTIES OF: ALAMEDA; CONTRA COSTA; FRESNO; KERN; KINGS; LOS ANGELES; MADERA; MERCED; ORANGE; RIVERSIDE; SAN BERNARDINO; SAN DIEGO; SAN FRANCISCO; SAN JOAQUIN; STANISLAUS; TULARE,

Defendants.

ORDER

Trial in the above matter came to a close in October of 1993. The parties submitted written closing arguments, which were thereafter supplemented by further briefing following decision by the Supreme Court in *Department of Revenue of Oregon v. ACF Industries, Inc.*, 114 S. Ct. 843 (Jan. 24, 1994). The case now under submission, the Court enters judgment in favor of plaintiff and directs the parties to draft findings of fact and conclusions of law in the manner directed below.

BACKGROUND

Plaintiff to this action challenges the defendants' imposition of a tax upon a class of property which defend-

ants call Non-Unitary Railroad Property Eligible for 4-R Act Relief (hereinafter "NURPEFAR") throughout the years 1989 to 1992. *See* Fourth Amended Complaint at ¶ 40. Plaintiff contends this classification was created solely upon plaintiff's rejection of an offer to allow commuter trains to run on its tracks—the "Commuter Property", and upon plaintiff's stated intention to dispose of some of its property—the "Restructuring Plan Property". Arguing that neither defendant State Board of Equalization ("SBE") nor the local county assessors imposes such a tax on any other taxpayer, plaintiff contends the challenged practice works a violation of section 306(1)(d) of the federal Railroad Revitalization and Regulatory Reform Act of 1976 (4-R Act) (codified in part at 49 U.S.C. § 11503).

Defendants justify their theory of taxation in the present case with reference to the "sticks" in a bundle of rights comprising property ownership. Defendants' Post Trial Br. at 17. "[F]or example, the right of an owner of a building to live in it is one stick, the right to rent it is another stick, and the right to sell it is yet another." *Id.* On this premise, defendants argue that "[w]hile all of the rights of ownership exist at all time not all the rights . . . necessarily have value at all time." *Id.* at 18.[1] Defendants argue these principles illuminate the present dispute, and support the legitimacy of defendants' attempts to tax, first, the value of that "stick" defined as the right to run commuter—as opposed to freight—trains, *id.*, and, second, that "stick" defined as plaintiff's stated intent to sell certain property.

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[1] For instance, defendants assert that while "the right to let others run their fiber optic cable over plaintiff's property existed in perpetuity," no value could have attached to that right before fiber optic cable existed. *Id.*

As to the former stick—the Commuter Property—the parties specifically refer to plaintiff's rejection of an offer to utilize plaintiff's train lines to run commuter trains for a consideration of $300 million. *See* Plaintiff's Trial Mem. at 5. From 1989 through 1992, plaintiff operated trains over the subject property for the purpose of transporting freight. *See* Stipulation as to Certain Facts—Santa Fe Witnesses at 3, Sept. 17, 1993. Although plaintiff "entered into negotiations to sell trackage rights in a portion of the Subject Property to various California transit authorities . . ., throughout the tax years 1989 through 1992, [plaintiff] continued to operate [the property in question] as a part of its operating unit in its primary function of transporting freight for hire." *Id.* Prior to January 1, 1992, plaintiff had not sold any of this property,[2] *id.* at 4; Plaintiff's Trial Mem. at 7, and prior to the 1992 assessment, the SBE had assigned no value to this interest. *See* Defendants' at 19; Hale Test., R.T. at 28-29. By the time of the 1992 assessment date, however, the SBE was informed that a consortium of counties had offered to buy the right to run commuter trains, and that the offer was refused. Defendants' Post Trial Br. at 19. Plaintiff contends these property interests were then designated as class codes 1 and 891 in the tax year 1992. *See* Plaintiff's Trial Mem. at 3.[3]

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[2] After January 1, 1992, plaintiff sold trackage rights and fee interests in portions of the Commuter Property, subject to freight easements allowing plaintiff continued use of the property for freight operations. *See* Plaintiff's Trial Mem. at 7; Stipulation as to Certain Facts—Santa Fe Witnesses at 3, Sept. 17, 1993.

[3] As explained below, class code descriptions ending in "1" refer to railroad *land* improvements; class code descriptions ending in "2" refer to railroad *improvements*. *See* Plaintiff's Trial Mem. at 3 n.3. For tax year 1989 only, there is additionally a small amount of class code "3" property—unitary personal property—which the SBE reclassified as class code 193 property—operating non-unitary personal property. *Id.*

As defendants frame the issue, the SBE used "all of the relevant data available" and "considered the rejected offer in valuing plaintiff's property." Defendant's Post Trial Br. at 19.

> The process of valuing the commute stick was no different than valuing any other non-unitary property. The basic question in valuing property is: what would a willing buyer pay a willing seller for the property at issue. . . . Here the Board knew there was a willing buyer who would pay $300 million for the property at issue. But the seller was not willing to sell at that price so the $300 million did not represent the fair market value. But because a buyer was willing to pay this $300 million the Board determined that it represented a minimum value—a floor—for the property at issue. As a result the Board used the $300 million rejected offer as a first step in calculating the assessed value to be assigned to the commute rights.

Defendants' Post Trial Br. at 19-20. In sum, defendants characterize their actions as utilizing "standard assessment procedures . . . to establish a very conservative minimum value." *Id.*

As to the latter stick in question—the Restructuring Plan Property—defendants used a list of properties to be disposed of in plaintiff's restructuring plan as a basis for establishing a new value for those properties. This value was then added to the total value of plaintiff, and thus considered for tax purposes for the years 1989 through 1992. *See* Plaintiff's Trial Mem. at 3; Defendants' Post Trial Br. at 2; Defendants' Closing Br. at 2. Specifically, the chronology is as follows: In 1986, plaintiff's Chairman of the Board announced that plaintiff intended to dispose of approximately 3,100 miles of track

over a period of five years to attempt to improve plaintiff's financial condition. *See* Plaintiff's Trial Mem. at 6. The property would be disposed of by offering it for sale or filing applications with the ICC to abandon railroad operations on these segments of the railway system. *Id.* Only a small portion of this track—approximately 337 miles—was located within the State of California. *Id.*

By 1989, plaintiff announced a revised restructuring plan which also called for disposing of approximately 3,100 miles of track—with approximately 366 miles in California, some of which was the same track identified in the 1986 plan. Plaintiff's Trial Mem. at 7. As of January 1, 1992, however, plaintiff had disposed of only three miles of the California track identified in the 1986 Restructuring Plan and only 154 miles of the California track identified in the 1989 Restructuring Plan. *Id.* Throughout the tax years 1989 to 1992, the SBE reclassified certain properties from unitary class codes 191 and 192 (which were changed for 1991 and 1992 to 891 and 892), based on these indicia that such properties might be sold or abandoned some time in the near future. Plaintiff's Trial Mem. at 3.

Defendants argue that these two sticks have been incorrectly viewed together for purposes of the present dispute, and that "two distinct situations [have been considered] as one under the rubric of NURPEFAR . . . ." Defendants' Closing Arg. at 2. Each of these sticks, it is true, is rooted in a separate soil. The Restructuring Plan Property, defendants argue, started as unitary property, but became non-unitary property, while the commercial lines were non-unitary property at all time. Defendants' Closing Arg. at 2. Plaintiff, by contrast, argues that, throughout tax years 1989 to 1992, *all* of the subject property was part of plaintiff's integrated railway

system and was "operated as a unit" by plaintiff "in its primary function" of transporting freight for hire. Plaintiff's Trial Mem. at 7. Accordingly, plaintiff argues it is properly within the statutory definition of "unitary property" provided by the California Revenue and Taxation Code. *See* Plaintiff's Trial Mem. at 7; Cal. Rev. & Tax. Code § 723.

Even assuming that defendants' characterization is the accurate one, the gravamen of the purported distinction is that, with respect to the rejected offer for the commuter lines, someone other than plaintiff established the valuation utilized by the SBE, whereas with the Restructuring Plan Property, the valuation was created by plaintiff itself. *See* Defendants' Closing Arg. at 3. Ultimately, this distinction is without meaningful difference. What governs the present analysis is not the fact that both sticks are, as conceded by defendants, properly labelled as NURPEFAR. *See* Defendants' Closing Arg. at 2. Rather the operative question is whether, looking beyond that label, a tax imposed on either of the sticks, viewed independently, is discriminatory within the meaning of subsection 306(1)(d). With respect to both the Commuter Property and the Restructuring Plan Property, the SBE took a value from the fact that plaintiff might—but did not actually—sell certain property interests. It is of little matter whether that possibility arose at the assessee's behest, as in the Restructuring Plan Property, or at the intimation of a third party, as with the Commuter Property. In both cases, the plaintiff is being taxed on the mere possibility of a sale. The analysis which ensues looks primarily at this factor in finding a violation of subsection 306(1)(d).

The posture of this case, as it now stands submitted, does not implicate questions of valuation. That issue has

not drawn a challenge from plaintiff for purposes of the litigation over the tax years now in question, since it is plaintiff's contention that the "value" of NURPEFAR should be zero. *See* Plaintiff's Trial Mem. at 5; Plaintiff's Closing Arg. at 3; Defendants' Post-Trial Br. at 9. Rather, the sole contention before the Court is one of the imposition of the tax in the first instance. Plaintiff seeks a declaratory judgment and the issuance of injunctive relief. *See* Fourth Amended Complaint at ¶ 2; 28 U.S.C. §§ 2201, 2202; 49 U.S.C. § 11503.

DISCUSSION

The statutory scheme from which the present challenge arose was enacted by Congress in part to protect the railroads of the United States, which " 'are easy prey for State and local tax assessors' in that they are 'nonvoting, often nonresident, targets for local taxation,' who cannot easily remove themselves from the locality." *Western Air Lines, Inc. v. Board of Equalization,* 107 S. Ct. 1038 (1987) (quoting S.Rep. No. 91-630, p.3 (1969)). That portion of the legislation invoked here—section 306—prohibits States and their subdivisions from enacting certain taxation schemes that discriminate against railroads. *ACF Industries,* 114 S. Ct. at 846.

Specifically, section 306(1) provides, in relevant part:

> [A]ny action described in this subsection is . . . unreasonable and unjust discrimination against and an undue burden on, interstate commerce. It is unlawful for a State, a political subdivision of a State, or a governmental entity or person acting on behalf of such State or subdivision to commit any of the following prohibited acts:
>
> (a) The assessment, (but only to the extent of any portion based on excessive values as hereinafter

described) for purposes of a property tax levied by any taxing district, of transportation property at a value which bears a higher ratio to the true market value of such transportation property than the ratio which the assessed value of all other commercial and industrial property in the same assessment jurisdiction bears to the true market value of all such other commercial and industrial property.

(b) The levy or collection of any tax on an assessment which is unlawful under subdivision (a).

(c) The levy or collection of any ad valorem property tax on transportation property at a tax rate higher than the tax rate generally applicable to commercial and industrial property in the same assessment jurisdiction.

(d) The imposition of any other tax which results in discriminatory treatment of a common carrier by railroad subject to this part.

4-R Act § 306(1).

Plaintiff has brought the present challenge under subsection 301(1)(d). That provision has been found to prohibit a variety of discriminatory taxation schemes. *See, e.g., Trailer Train Co. v. Leuenberger,* 885 F.2d 415, 418 (8th Cir. 1988), *cert. denied, sub nom., Boehm v. Trailer Train Co.,* 490 U.S. 1066 (1989) ("When the exceptions apply to three-fourths of the commercial and industrial property in Nebraska and do not apply to rail cars, the tax system in Nebraska discriminates against [the railroads]."); *Burlington Northern Railroad Co. v. Bair,* 766 F.2d 1222, 1224 (8th Cir. 1985) ("[C]lassification scheme results in obvious discrimination against Burlington Northern by excluding it from the benefits of personal property tax roll-backs and credits which most

of the taxpayers enjoy."); *Ogilvie v. State Board of Equalization*, 657 F.2d 204, 210 (8th Cir.), *cert. denied*, 454 U.S. 1086 (1981).

The most recent word on the scope of subsection 306(1)(d) was spoken by the Supreme Court in *ACF Industries*, 114 S. Ct. 843. Reversing a Ninth Circuit decision, the Court upheld a challenged Oregon taxation scheme, under which numerous non-railroad entities were granted exemptions from an otherwise generally applicable ad valorem tax. Significantly, however, the Court noted that under the scheme, railroads were "not . . . the only commercial entities subject to an ad valorem property tax . . . ." 114 S. Ct. at 851.

> If such a case were to arise, it might be incorrect to say that the state 'exempted' the nontaxed property. Rather, one could say that the state had singled out railroad property for discriminatory treatment. . . . On the record before us, we need not decide whether subsection [(1)(d)] would prohibit a tax of that nature.

Id. at 851-52. That decision does not affect the present analysis, given the different taxation schemes at issue. There, the Supreme Court undertook to determine whether plaintiffs were discriminated against in not receiving exemptions to an otherwise valid ad valorem tax; by contrast, the present case involves the legitimacy of a particular tax for which plaintiff was indeed "singled out". *See id.* at 851-52.

The contours of liability under subsection 306(1)(d) were specifically outlined in an earlier Order of this Court. There, the Court set forth the three elements necessary to establish discrimination under section 306 (1)(d):

(i) That the entity being discriminated against is a member of a class possessing a particular legally or legislatively defined characteristic ("the *Protected Class*");

(ii) That there is some law, act, or practice that causes *disparate treatment* of the Protected class compared to others similarly situated with respect to the purpose of the law, act or practice ("the Classification"), and most importantly;

(iii) That, as a result of the Classification, he or she has *suffered an unfair or unreasonable burden, impact or deprivation of a right.*

Order, April 19, 1993, at 7 (emphasis in original). Moreover, as defendants accurately point out, *see* Defendants' Post Trial Br. at 6, it is the plaintiff which bears the burden of proving these elements are met. *See Burlington Northern Railroad Co. v. James,* 911 F.2d 1297, 1300 (8th Cir. 1990).

An application of the facts adduced at trial to the above test yields the conclusion that defendants have imposed a discriminatory tax on plaintiff in violation of subsection 306(1)(d) with respect to both the Commuter Property and the Restructuring Plan Property.

The first element of the test is indisputably met, and defendants have acknowledged as much. Plaintiff Santa Fe, as a railroad, is a member of a "protected class" for purposes of the 4-R Act.

The second element is also met. An appropriate analysis must begin with a description of the methods of taxation involved here. Pursuant to California's Revenue and Taxation Code, the SBE identifies, classifies, assesses and values plaintiff's property. The SBE then informs counties

of the assessed valuation for such property within their boundaries, and the counties, in turn, levy and collect property taxes on the basis of the assessed values determined by the SBE. *See* Fourth Amended Complaint at ¶ 7.

Interstate Commerce Commission Accounting Rules and California law provide that, as pertains to regulated railway companies, "there shall be only two classifications of property for purposes of this code, unitary and nonunitary." Cal. Rev. & Tax. Code § 723.1. Unitary property is that property which is used for the primary function of the owner. With the exception of the select property here at issue, the SBE has determined that nonunitary property is that property completely unrelated to the operation of the railroad.

As is illustrated by its Policy Statement, however, the SBE has purposefully engaged in a practice of classifying and taxing NURPEFAR. *See* Exh. 30. Under the General Definition section of the Policy, *unitary property* is defined as "property items owned by the state assessee and used in its utility or railroad operation"; *nonunitary property* is defined as "property owned by a state assessee but not used or needed for its utility or railroad operation"; and, *NURPEFAR* is defined as "property or property rights owned by a railroad." Plaintiff's Closing Arg. at 9.

Further, under California law, absent a change in ownership (as defined in California Revenue and Taxation Code §§ 60 *et seq.*) or the completion of any new construction, the defendant counties may not reassess real property. *See* Cal. Const. Art. XIIIA; Stipulation as to Certain Facts—County Assessors at 2, Sept. 17, 1993. Rather, even in the event of a substantial intervening increase in market value of real property, an assessee

could not be taxed at a rate reflecting more than a 2% increase in an assessment each year. Plaintiff's Closing Arg, at 5-6. Using a hypothetical in which a taxed subject had a market value of $100,000, Gary Gillan, the Assistant Assessor for Los Angeles County, acknowledged that a tax could be imposed on no greater an amount than $102,000 the following year. *See Gillan* Test., R.T. at 57-58 (Oct. 5, 1993).

The parties have agreed by stipulation to the permissible scope of a county's powers in taxing real property interests. *See* Stipulation as to Certain Facts—County Assessors, Sept. 17, 1993. Defendant counties assess to the owner of real property the entire "bundle of rights" which comprises locally assessed real property together, with the exception of separately-owned leasehold improvements, mineral rights and other inchoate rights, any or all of which may be separately assessed. *Id.* at 3-4. However, defendant counties do not assess such rights until the interest is sold and they do not assess such rights separately to property owners who have not sold such rights. *Id.* at 4. Specifically, the parties agree that the defendant counties neither reassess real property based on an owner's stated intent to try and sell the property sometime in the future, nor as a result of the owner's offering the property for sale, announcing that the property is for sale, or negotiating for a sale. *See id.* at 2. Upon comparison of the above restrictions to the evidence introduced at trial, it is apparent that what is preached is not practiced.

The SBE has strayed from the above restrictions by imposing a tax upon a class of railroad property that is not imposed on other, non-railroad property. The parties have stipulated that neither the SBE nor the defendant counties has adopted specific guidelines as to how to

value the individual pieces that make up the "bundle of rights" comprising locally assessed property. Stipulation as to Certain Facts—County Assessors, Sept. 17, 1993 at 4. Pursuant to actual practice, however, when it believes an owner of rail transportation property intends to dispose of a portion of its property or has rejected an offer for the sale of certain property rights, the SBE classifies that property as NURPEFAR and imposes a tax based on the value assessed to that property. *See* Plaintiff's Closing Arg. at 3.

Specifically, plaintiff alleges in Counts One and Two of its Fourth Amended Complaint that, when the SBE believes that an owner of rail transportation property may dispose of a portion of such property, the SBE classifies such property as NURPEFAR in property class codes 891, 892 or 893, and taxes it as such. *See* Fourth Amended Complaint at ¶¶ 19, 22. The essence of the claims raised in Counts One and Two of the Fourth Amended Complaint is that defendants have discriminated against plaintiff in violation of subsection 306(1)(d) by imposing "any other tax" that results in discriminatory treatment of a common carrier subject to the 4-R Act.[4]

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[4] In the First Count, plaintiff specifically alleges the tax has been on property interests for which other similarly situated taxpayers are not taxed. *See* Fourth Amended Complaint at ¶¶ 22-24. In its Second Count, plaintiff specifically alleges that it has been subject to a double taxation violative of both section 306 and equal protection. *See* Fourth Amended Complaint at ¶¶ 25-32.

In the Third Count, plaintiff claims that an assessment has been discriminatorily imposed in violation of section 306. *See* Fourth Amended Complaint ¶¶ 33-40. The parties have agreed that the issues in Count Three would be litigated in a separate proceeding following resolution of the primary issues addressed in this case.

On December 2, 1993, plaintiff filed a Fifth Amended Complaint, repeating the same allegations contained herein, and also including a Fourth Count challenging disscriminatory assessment alleged to have been imposed in 1993.

The SBE describes property in class code 801 as non-unitary railroad *land* eligible for 4-R Act relief; property in class code 892 as non-unitary railroad *improvements* eligible for 4-R Act relief; and property in class code 893 as non-unitary railroad *personal property* eligible for 4-R Act relief. *Id.* at ¶ 20. This case relates primarily to property classified by the SBE in class codes 891 and 892. *See* Plaintiff's Trial Mem. at 2 n.1. As plaintiff underscores, according to the SBE's own definition, NURPEFAR is the only class of property which provides for the taxation of property rights; further, only property owned by railroads can be assigned to this new property class. Plaintiff's Closing Arg. at 9-10.

Defendants argue throughout that neither the SBE nor any county assesses or appraises a property based on the fact that an owner may sell the property. *See* Defendants' Post Trial Br. at 7. In support of this assertion, defendants cite only the "uncontradicted" testimony of Harold Hale, the Principal Property Appraiser for Transportation Properties at the SBE. *See id.* at 7-8. There, in response to questions whether an announcement of a restructuring plan, or an offer to purchase the property, would trigger the "immediate valuation of any property on that plan," Mr. Hale responded, "No. The property would not be valued until the next lien date." *See id.* at 8. The answer does not deny that a restructuring plan or purchase offer could be taken into account by the SBE, however, but merely states the time at which such information might be taken into account. Thus, the "uncontradicted" testimony does not foreclose the possibility that defendants have impermissibly used a rejected offer or proposed restructuring as the basis for assessing the subject property at a higher rate, and prior to a change of ownership, notwithstanding defendants' contention that neither the SBE nor any county assesses or

appraises a property based on such criteria. *See* Defendants' Post Trial Br. at 7.

Defendants further argue that the appropriate undertaking for the Court at this stage is to consider the appropriate assessment ratio to be applied to the subject property.[5] That test, according to defendants, is as follows: Board Fair Market Value × Board Ratio = County Fair Market Value × County Ratio. "If the equation is valid, if both sides are equal or within 5%, there is no violation of § 306." Defendants' Post Trial Br. at 10.

This suggestion is misplaced. The issue governing this case is not what assessment ratio should be applied to the subject property, but instead whether an imposed tax on plaintiff's property is, in itself, a discriminatory one. *See* Plaintiff's Supp. Br. at 8. Indeed, the statutory structure of § 306(1) makes this much apparent. While subsections 306(1)(a)-(c) prohibit discrimination in assessment ratios and rates of taxation, subsection 306(1)(d) speaks in more expansive terms, and prohibits "any other tax. . . ." The Ninth Circuit opinion in *ACF Industries* found such proof of disparate assessment ratios not necessary to prove a violation under subsection 306(1)(d), writing that it was "not surprising" that other courts had applied subsection (1)(d) to

> prevent other forms of discrimination in property taxes that [were] not reached by subsections (1)(a) and (1)(c) . . . . We conclude, therefore, that Sec-

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[5] Indeed, defendants argue at one point in their papers that this case actually must be analyzed not under subsection 306(1)(d), but under subsection 306(1)(a). *See* Defendants' Post Trial Br. at 14-15. As discussed above, this case does not directly implicate a challenge to matters of valuation of subject property. Rather, plaintiff's sole contention is that the SBE's creation of NURPEFAR effects a violation of subsection 306(1)(d). *See* Plaintiff's Trial Mem. at 5; Plaintiff's Closing Arg. at 3.

> tion 306(1)(d) prohibits not only discriminatory taxes other than property taxes subject to subsections (1)(a) and (1)(c) but also . . . taxation of a railroad's transportation property which discriminates in a manner other than by assessment ratio or rate.

961 F.2d 813, 820. While that decision was reversed, the reversal was on the sole basis that a state could grant exceptions to a generally applicable ad valorem property tax without subjecting the taxation of railroad property to challenge under subsection 306(d)(1) the 4-R Act. The above-quoted portion of the Ninth Circuit opinion, holding generally that subsection 306(1)(d) covers discriminatory taxes other than by assessment ratio or rate, was not called into question by the holding or analysis of the opinion for factual situations other than those implicating exemptions. *See* 114 S. Ct. at 847-50. The Ninth Circuit's discussion of the matter, which also reflects the present law of various other circuits, *see Ogilvie*, 657 F.2d at 10; *Department of Revenue, State of Florida v. Trailer Train Co.*, 830 F.2d 1567, 1573 (11th Cir. 1987), thus remains persuasive despite the decision's subsequent reversal.

Defendants argue that, even in the event plaintiff's claims are cognizable under § 306(1)(d), there is no violation of that subsection because, as "railroads are all centrally assessed there can be no identical county actions to compare." Defendants' Post Trial Br. at 17. Further, defendants argue that when counties are presented with "situations similar to the factual situation of this case, they treat them the same as does the Board." *Id.* These contentions bring the Court to the fundament of this dispute.

Defendants point to various situations "as closely comparable, in principle, to this case as they can be without

involving railroads." Defendants' Post Trial Br. at 20. First, defendants pose the scenario of placing advertisements on a building. Such placement, according to defendants, would not infringe other uses of the building, and an offer to place such advertising, if made and rejected, would be properly considered as one of the various sticks in the bundle of property rights for purposes of valuing the property as of the next assessment date. Defendants' Post Trial Br. at 20-21.

As a second example, defendants float the issue of "air rights" as properly considered within the scope of valuation determinations. *See* Defendants' Post Trial Br. at 21. Defendants cite to the trial testimony of Charles Knudsen, the Manager of Assessment Services for the SBE, who was presented with a hypothetical situation involving an offer for purchase of air rights between two commercial buildings with the aim of constructing a passageway. On the supposition that an offer was rejected, Mr. Knudsen testified that rejected offer "could" be taken into account in the assessment. Knudsen Test., R.T. at 100:5-101:25.

In a third example, defendants analogize the present, challenged practice to the taking into account of a rejected offer for purchase of transferrable development rights, *i.e.* those rights to build to specified space limits. *See* Defendants' Post Trial Br. at 22-23. Since, by definition, such rights are transferrable to owners of other properties, the purchase of the rights would increase the total value of the property to which they were added and, as a corollary, decrease the total value of the land from which they were taken. Thus, defendants argue, the transferrable development rights are part of the bundle of rights from which a local appraiser could properly consider a rejected offer as "information that ought to be considered, and perhaps given considerable weight by the ap-

praiser." Defendants' Post Trial Br. at 23; Gillan Test., R.T. at 10:3-5.

Defendants contend these examples fit tightly as analogies because each instance presents a bundle of rights in which one stick has value independent to, and can be sold without detracting from the value of, the remaining sticks. *See* Defendants' Post Trial Br. 20. The present case, as framed by defendants, similarly involves a rejected offer to buy one stick, the sale of which could not have interfered with the remainder of the business. *Id.* at 21. In sum, defendants contend on the basis of their proffered examples that "the evidence shows that there is no discrimination against plaintiff in the way in which the Board and local assessors would appraise property like the commuter lines." Defendants' Post Trial Br. at 23.

This line of argument must be rejected. As pertains to the last two examples, both transferrable development rights and air rights are interests which have been deemed cognizable and which may be accounted for in an assessment or reassessment. Gillan Test., R.T. at 16:15-17; Knudsen Test., R.T. 100:5-21. Each of these interests, importantly, would have a value independent of, and prior to, any attempted sale of the interest. Accordingly, then, in each of these examples, a completed transaction for the sale of transferrable development rights or air rights might also be taken into account as a taxable value in a reassessment. Equally important, such interests are present in various contexts and as to various assessees, unlike the isolated and therefore discriminatory use of NURPEFAR with respect only to owners of railroads.

The taxation of preexisting, cognizable interests in such forms as transferrable development rights and air rights is thus distinct from situations such as the present one,

which implicates merely an attempted but uncompleted sale of an interest which has not been deemed to have a taxable value prior to a lien date. Thus, a more accurate way of phrasing defendants' examples would be whether the *proposed* sale of air rights or transferrable development rights could trigger a reassessment. Clearly, under the existing practices by defendants, it could not. Further, this distinction plagues the first example cited by defendants, since it is unsubstantiated that defendants have ever taxed an assessee on the basis of an offer to place advertising, once made and rejected. Defendants' Post Trial Br. at 20-21. Finally, it is no answer to suggest, as defendants have, that the SBE *would* tax other assessees in a manner similar to plaintiff if the situation were to arise in the future, *see* Hale Test., R.T. 81:2-6. Such a response is purely speculative.

It is the task of the Court to decide whether defendants have in practice imposed such similar taxes on others similarly situated. Based on the evidence submitted at trial, the answer to that inquiry is a resounding "no." Upon being asked whether there were "any other state-assessed properties . . . that had their property classified . . . on the stated intent to sell the property some time in the future, or based on a failed or not completed sale negotiation," Mr. Hale responded that he was "not aware of any specific circumstance in the past." Plaintiff's Closing Arg. at 11; Plaintiff's Supp. Brief at 7 n.3; Hale Test., R.T. 67:8-15 (Sept. 28, 1993). The testimony of Mr. Knudsen is in accord. *See* Plaintiff Closing Arg. at 12-13; Knudsen Test., R.T. 106-07 (Sept. 28, 1993).

The evidence proves that no other similarly situated taxpayers have been taxed in similar manner. Neither other state assessees nor locally assessed commercial and industrial property taxpayers are classified and taxed based on the "right" to do something different with their

property in the future. Plaintiff's Closing Arg. at 11. Accordingly, the Court finds the second prong of the operative test met.

It is, finally, clear that the third part of the test governing this dispute is met. As a result of the classification, plaintiff has suffered an unfair or unreasonable burden, impact or deprivation of a right. Mr. Hale testified that plaintiff has been taxed in the manner here solely by virtue of the SBE's classification practices. *See* R.T. 66:5-8 (Sept. 28, 1993). As a result, plaintiff claims it has been assessed taxes in the amount of $3,003,098 based solely on the classification of some of its property as NURPEFAR, *see* Plaintiff's Closing Arg. at 13, a fact clearly amounting to "an unfair or unreasonable burden."

The remaining question before the Court is what remedy is properly called for upon finding a violation of subsection 306(1)(d). As discussed above, the actionable wrong committed by defendants cannot be configured as an error in computing assessment ratios. Rather, the wrong consists in the imposition of the tax in the first instance. There can accordingly be only one fitting remedy—that which would correct the wrongfully imposed tax. The appropriate remedy thus is not merely to reduce the assessment ratio, but to eliminate altogether the imposition of the discriminatory tax. The Court hereby enters a declaratory judgment that the challenged taxes effect a violation of subsection 306(1)(d). As pertains to further disputes generating from plaintiff's overpayment of taxes, and plaintiff's right to a refund of such amounts, *see* Plaintiff's Closing Arg. at 15, the parties shall attempt to resolve such matters.

CONCLUSION

For the foregoing reasons, the Court enters a declaratory judgment that defendants have violated subsection 306(1)(d) of the 4-R Act with respect to the challenges pleaded in Counts One and Two of plaintiff's Fourth Amended Complaint.[6] Plaintiff shall draft proposed findings of fact and conclusions of law consistent with this Order, for submission with the Court by July 22, 1994. Defendants may submit an opposition to those findings and conclusions by August 5, 1994.

A status conference scheduled for June 9, 1994, at 3:30 p.m. shall remain in effect.

IT IS SO ORDERED.

Dated: June 7, 1994.

/s/ D. Lowell Jensen
D. LOWELL JENSEN
United States District Judge

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[6] The Court's finding of a violation of Count Two is premised solely on subsection 306(1)(d), and not on the Equal Protection Clause.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C 89-4030 DLJ

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,

Plaintiff,

v.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA; COUNTIES OF: ALAMEDA; CONTRA COSTA; FRESNO; KERN; KINGS; LOS ANGELES; MADERA; MERCED; ORANGE; RIVERSIDE; SAN BERNARDINO; SAN DIEGO; SAN FRANCISCO; SAN JOAQUIN; STANISLAUS; TULARE,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to an Order of the Court dated June 7, 1994, plaintiff Atchison, Topeka & Santa Fe Railway Company ("Santa Fe") submitted proposed Findings of Fact and Conclusions of Law in the above-captioned matter. Defendant State Board of Equalization of the State of California (hereinafter "SBE") elected not to respond to that submission.

The Court now enters Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT

1. Santa Fe is a Delaware corporation having its principal place of business in Schaumburg, Illinois. Santa Fe is a rail carrier providing transportation and is subject to the jurisdiction of the Interstate Commerce Commission.

2. Defendant SBE, is, and at all times relevant herein was, a political subdivision and agency of the State of California with the duty of assessing railroad property in the State of California.

3. Pursuant to California' Revenue and Taxation Code, the SBE identifies, classifies, assesses and values Santa Fe's property. It informs the defendant Counties of the assessed valuation for such property within their boundaries. In doing so, the SBE further informs the defendant Counties of the value allocated to each tax rate area code appearing upon the roll of each county. The defendant Counties, in turn, levy and collect property taxes for themselves and for each tax rate area code appearing on their rolls in accordance with the assessed values determined by the SBE.

4. The defendant Counties have sought to collect from Santa Fe ad valorem taxes on the "Subject Property" (as defined in Paragraph 12) for tax years 1989, 1990, 1991 and 1992.

5. Santa Fe has challenged the assessment and collection of ad valorem taxes against the Subject Property pursuant to Section 306(1)(a) and (d) of the Railroad Revitalization and Regulatory Reform Act at 49 U.S.C. § 11503 (hereafter "the 4-R Act). These Findings of Fact and Conclusions of Law relate only to Santa Fe's claims under Section 306(1)(d).

6. For purposes of ad valorem taxation, currently the SBE divides railroad property into three categories: uni-

tary property, non-unitary property and "Non-unitary Railroad Property Eligible for 4-R Act Relief" (hereafter referred to as "NURPEFAR").

7. The SBE has determined that unitary property is that property which is used for the primary function of the owner. All unitary property is rail transportation property within the meaning of the 4-R Act.

8. With the exception of the Subject Property, the SBE has determined that non-unitary property is that property totally unrelated to the operation of the railroad, and the SBE treats all such non-unitary property as non-rail transportation property.

9. As is illustrated by its Policy Statement, the SBE has purposefully engaged in a practice of classifying and taxing NURPEFAR. Under the general definition section of the Policy Statement, NURPEFAR is defined as "property or property rights owned by a railroad."

10. When the SBE believes that an owner of rail transportation property intends to dispose of a portion of its property or has rejected an offer for the sale of certain property rights, the SBE classifies such property as NURPEFAR and places it in property class codes 891, 892 or 893 and taxes it as such.

11. The SBE describes property in class code 891 as nonunitary railroad *land* eligible for 4-R Act relief; property in class code 892 as non-unitary railroad *improvements* eligible for 4-R Act relief; property in class code 893 as non-unitary railroad *personal property* eligible for 4-R Act relief. The class codes were formerly numbered 191, 192 and 193, respectively. When the SBE used class codes 191, 192 and 193, it identified such property as "Operating Non-Unitary Property," even though California law prohibits this classification for railroad property.

12. The property which is the subject of this action ("the Subject Property") consists of two basic categories of NURPEFAR: (1) properties which the SBE reclassified for tax years 1989 through 1992 from unitary class codes 1 and 2 to "operating non-unitary" class codes 191 and 192 (changed for 1991 and 1992 to 891 and 892), based on statements by Santa Fe's management in 1986 and/or 1989 that such properties might be "sold or abandoned" sometime in the future (hereinafter referred to as "the Restructuring Plan Property"), and (2) properties which the SBE assigned both class codes 1 and 891 to in tax year 1992, based on Santa Fe's negotiations with various southern California transit districts to sell track and/or trackage rights for commuter purposed (hereinafter referred to as "the Commuter Property").

13. For tax years 1989 through 1992, all of the Subject Property was taxed as part of Santa Fe's unitary property and again as NURPEFAR.

14. The Subject Property is the only class of property in the State of California that is taxed on the basis that it may be sold or otherwise disposed of in the future. No locally assessed properties or other state assessed properties are taxed on this basis.

15. Only Santa Fe, and other owners of rail transportation property, own property classified as NURPEFAR.

16. During tax years 1989 through 1992, the Subject Property was part of Santa Fe's integrated railway system and was operated as a unit by Santa Fe in its primary function of transporting freight for hire. Santa Fe operated trains over the Subject Property on a regular basis to transport freight.

17. Throughout tax years 1989 and 1992, Santa Fe continued to operate the Commuter Property as a part

of its operating unit in its primary function of transporting freight for hire.

18. The Commuter Property was then assigned an additional Class Code of 891 in tax year 1992.

19. Prior to the lien dates on which the SBE assigned an additional Class Code of 891 to Commuter Property, such property had not been sold.

20. As of January 1, 1992, Santa Fe had not sold any of the Commuter Property and prior to the 1992 assessment, the SBE had assigned no value to this interest.

21. By the time of the 1992 assessment date, however, the SBE was informed that a consortium of counties had offered to buy the right to run commuter trains over the Commuter Property and that the offer was refused.

22. The SBE set the value of Santa Fe's Commuter Property for tax year 1992 at $300,000,000, based on the offer which Santa Fe had refused.

23. With respect to the Restructuring Plan Property, in 1986, Santa Fe's chairman of the board announced that Santa Fe intended to dispose of approximately 3,100 miles of track over a period of five years in an effort to improve Santa Fe's financial condition.

24. The Restructuring Plan Property would be disposed of by offering it for sale or filing applications with the ICC to abandon railroad operations on these segments of the railway system.

25. Only a small portion of the Restructuring Plan Property—approximately 337 miles of track—was located within the State of California.

26. By 1989, Santa Fe announced a revised Restructuring Plan which also called for disposing of approxi-

mately 3,100 miles of track—with approximately 366 miles in California, some of which was the same track identified in the 1986 plan.

27. Prior to the lien dates on which the SBE reclassified the Restructuring Plan Property as Class Codes 891, 892 or 893, none of that property had been sold.

28. As of January 1, 1992, Santa Fe had disposed of three miles of the California track identified in the 1986 Restructuring Plan and 154 miles of the California track identified in the 1989 Restructuring Plan.

29. Defendants used a list of properties to be disposed of in Santa Fe's 1986 and/or 1989 Restructuring Plans as a basis for establishing a new value for those properties.

30. This value was then added to the total value of Santa Fe, and thus taxed for tax years 1989 through 1992.

31. Defendant Counties assess all real property, including virtually all locally-assessed commercial and industrial real property, based on its fair market value as of March 1, 1975. In accordance with Proposition 13, Article XIIIA of the California Constitution, defendant Counties only reassess real property: (1) as of the date of a "change in ownership" (as defined in California Revenue and Taxation Code §§ 60, *et seq.*) of the real property after March 1, 1975; or (2) as of the date of completion of any new construction which occurred after March 1, 1975; or (3) if the current fair market value of the property has declined from the amount determined in accordance with the above rules.

32. Defendant Counties do not reassess real property based upon the owner's stated intent to try to sell the property sometime in the future. This does not constitute a change in ownership as defined under California law.

33. Defendant Counties do not reassess real property as a result of the owner's offering the property for sale, announcing that the property is for sale, or negotiating for a sale, because such property cannot be reassessed unless and until there is a change in ownership as defined under California law.

34. Defendant Counties do not reassess real property which is offered for sale as a result of the owner receiving an offer to purchase such property when the offer is rejected by the owner. This does not constitute a change in ownership as defined under California law.

35. With the exception of taxable possessory interests, as defined in California Revenue and Taxation Code §§ 107 *et seq.*, defendant Counties do not reassess real property when the owner of such property enters into a licensing agreement or lease which will allow another person to use the property for a term shorter than 35 years. This does not constitute a change in ownership as defined under California law.

36. Defendant Counties do not reassess real property as a result of increased intensity in the use of such property by the owner or as a result of the increased use of that property by a different person or entity. This does not constitute a change in ownership as defined under California law.

37. Defendant Counties do not reassess real property if the owner of the property leases or rents the property for use at times when the owner is not using it or for a use different than what the owner uses the property for during his use of the property provided that the lease which authorizes such use is for a term shorter than 35 years. This does not constitute a change in ownership as defined under California law.

38. When real property or property rights are sold in California, any property taxes assessed after the sale occurs are not assessed to the seller of the real property or property rights.

39. Defendant Counties assess to the owner of real property the entire "bundle of rights" which comprises locally assessed real property together, with the exception of separately-owned leasehold improvements, mineral rights and other inchoate rights, any or all of which may be separately assessed; however, defendant Counties do not assess such rights separately ot property owners who have not sold such rights.

40. Neither the SBE nor the defendant Counties has adopted specific guidelines as to how to value the individual pieces that make up the "bundle of rights" comprising locally assessed property.

41. Santa Fe, as a railroad, is a member of a "protected class" for purposes of the 4-R Act, and defendants concede this fact.

42. According to the SBE's own definition, NURPEFAR is the only class of property which provides for the taxation of property "rights"; further, only property owned by a railroad can be assigned to this new property class.

43. Defendants have used a rejected purchase offer for the Commuter Property and Santa Fe's announcements about the proposed sale or abandonment of track in its 1986 and/or 1989 Restructuring Plans as the basis for assessing the Subject Property. Defendants have done so prior to any change in ownership and notwithstanding their concessions that neither the SBE nor any county assesses any other California property based on such criteria.

44. Defendants have imposed a tax upon a class of Santa Fe's railroad property that is not imposed on other, non-railroad property.

45. The evidence proves that no other similarly situated taxpayers have been taxed in a manner similar to Santa Fe or other railroads. Neither other state assesses nor locally assessed commercial and industrial property taxpayers are classified and taxed based on the unexercised "right" to sell or do something different with their property in the future.

46. As a result of the classification of its property as NURPEFAR, Santa Fe has suffered an unfair or unreasonable burden, impact or deprivation of a right.

47. The evidence establishes that Santa Fe has been taxed in the manner at issue solely by virtue of the SBE's classification practices, and that as a result, Santa Fe has been forced to pay taxes in the amount of $3,003,098 based solely upon the classification of some of its property as NURPEFAR, a fact clearly amounting to "an unfair or unreasonable burden."

48. Defendants' taxation of the Subject Property based on the SBE's classification of it as NURPEFAR or Operating Non-Unitary Property results in discriminatory treatment of Santa Fe.

CONCLUSIONS OF LAW

1. This action does not implicate questions of valuation; rather, the sole contention before the Court is one of the imposition of the tax on the Subject Property in the first instance.

2. Specifically, the issue is whether the imposition of this tax violates Section 306(1)(d) of the 4-R Act. The Court finds that it does.

3. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1337 as well as 39 U.S.C. § 11503.

4. Congress enacted Section 306(1)(d) of the 4-R Act in part to protect the railroads of the United States, which " 'are easy prey for state and local tax assessors' in that they are 'nonvoting, often nonresident, targets for local taxation,' who cannot easily remove themselves from the locality." *Western Airlines, Inc. v. Board of Equalization*, 107 S. Ct. 1038 (1987) (*quoting* S. Rep. No. 91-630, p.3 (1969)).

5. Section 306 of the 4-R Act prohibits states and their political subdivisions from enacting certain taxation schemes that discriminate against railroads.

6. Specifically, Section 306(1) provides, in relevant part:

> [A]ny action described in this subsection is . . . unreasonable and unjust discrimination against and an undue burden on, interstate commerce. It is unlawful for a State, political subdivision of the State or governmental entity or person acting on behalf of such state or subdivision to commit any of the following prohibited acts: . . .
>
> * * * *
>
> (d) The imposition of any other tax which results in discriminatory treatment of a common carrier by railroads subject to this part.

7. Santa Fe has brought this action under Section 306(1)(d). This provision has been found to prohibit a variety of discriminatory taxation schemes, including instances where, as here, railroad property has been "singled out" for discriminatory taxation. *Department of Revenue of Oregon v. ACF Industries*, 114 S. Ct. 843 (January 24, 1994).

8. The three elements necessary to establish discrimination under Section 306(1)(d) are:

> (i) That the entity being discriminated against is a member of a class possessing a particular legally or legislatively defined characteristic ("the *Protected Class*");
>
> (ii) That there is some law, act or practice that causes *disparate treatment* of the Protected Class compared to others similarly situated with respect to the purpose of the law, act or practice ("the Classification"), and most importantly;
>
> (iii) That, as a result of the Classification, he or she has *suffered an unfair or unreasonable burden, impact or deprivation of a right.*

9. Santa Fe has met its burden of proving these elements are met in this case with respect to both the Commuter Property and the Restructuring Plan Property.

10. California law provides that, as pertains to regulated railway companies, "there shall be only two classifications of property for purposes of this code, unitary and non-unitary." Cal. Rev. & Tax Code § 723.1. California law does not recognize or permit the classification of property the SBE has labelled NURPEFAR.

11. The Court rejects defendants' argument that the appropriate undertaking for the Court at this state is to consider the appropriate assessment ratio to be applied to the Subject Property. The issue governing this case is not what assessment ratio should be applied to the Subject Property, but instead whether the tax imposed on Santa Fe's property is, in itself, a discriminatory one.

12. While subsections 306(1)(a) through (c) prohibit discrimination in assessment ratios and rates of tax-

ation, subsection 306(1)(d) speaks in more expansive terms, and prohibits "any other tax . . ." which discriminates against common rail carriers.

13. The Court finds that defendants have discriminated against Santa Fe in violation of subsection 306(1)(d) by imposing "any other tax" that results in discriminatory treatment of a common carrier subject to the 4-R Act.

14. Defendants are hereby permanently enjoined from collecting or seeking to collect any taxes on the Subject Property for tax years 1989 through 1992.

15. Defendants are hereby ordered to pay Santa Fe a refund of $3,003,098.00 for taxes paid on the Subject Property for tax years 1989 through 1992, plus interest at the rate of nine percent (9%) per annum from the dates the taxes were paid until refunded, or to allow Santa Fe a credit against future property tax payments in the amount of $3,003,098.00, together with interest at the rate of nine percent (9%) per annum from the dates the taxes were paid until fully credited.

16. In addition to the claims addressed herein, Santa Fe has brought similar claims for the 1993 tax year. While the Court will resolve those issues at a later date, the same legal principles set forth herein will apply to the resolution of those claims.

IT IS SO ORDERED.

DATED: September 7, 1994

/s/ D. Lowell Jensen
D. LOWELL JENSEN
United States District Judge

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Master Consolidated
Number C 81-4365 DLJ

No. C 89-4030 DLJ

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,

Plaintiff,

v.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA; COUNTIES OF: ALAMEDA; CONTRA COSTA; FRESNO; KERN; KINGS; LOS ANGELES; MADERA; MERCED; ORANGE; RIVERSIDE; SAN BERNARDINO; SAN DIEGO; SAN FRANCISCO; SAN JOAQUIN; STANISLAUS; TULARE,

Defendants.

PARTIAL JUDGMENT

Plaintiff, the Atchison, Topeka & Santa Fe Railway Company ("Santa Fe") has challenged the assessment and collection of ad valorem taxes against its property pursuant to Sections 306(1)(a) and (d) of the Railroad Revitalization and Regulatory Reform Act at 49 U.S.C. § 11503 hereinafter "the 4-R Act"). The Court held a trial concerning only Santa Fe's claims under subsection 306(1)(d) of the 4-R Act for tax years 1989 through 1992. The Court found that defendants discriminated against Santa Fe in violation of subsection 306(1)(d) by imposing a tax that results in discriminatory treatment of Santa Fe.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. The Court's Findings of Fact and Conclusions of Law relating to the trial of Santa Fe's claims under subsection 306(1)(d) of the 4-R Act are incorporated herein as part of this Partial Judgment by this reference.

2. Defendants have discriminated against Santa Fe in violation of subsection 306(1)(d) of the 4-R Act by imposing a tax that results in discriminatory treatment of Santa Fe.

3. Defendants are permanently enjoined from collecting or seeking to collect any taxes on the Subject Property as defined in the Court's Findings of Fact and Conclusions of Law for tax years 1989 through 1992.

4. Defendants shall pay Santa Fe a refund of $3,003,098 for the taxes paid on the Subject Property for tax years 1989 through 1992, plus interest at the rate of 9% per annum from the dates the taxes were paid until refunded; alternatively, defendants shall grant Santa Fe a credit against future property tax payments in the amount of $3,003,098, together with interest, at the rate of 9% per annum from the dates the taxes were paid until fully credited. Defendants shall notify Santa Fe within 30 days of entry of this Partial Judgment whether they intend to issue to Santa Fe the refund or grant the credit described above.

5. This Partial Judgment does not resolve any of Santa Fe's claims relating to tax year 1993 nor does it resolve Santa Fe's claims brought pursuant to subsection 306(1)(a) of the 4-R Act for tax years 1989 through 1992.

6. In accordance with Rule 54(b), Federal Rules of Civil Procedure, the Court hereby expressly determines

that there is no just reason for delay and directs the entry of judgment as set forth herein.

DONE IN OPEN COURT this 12th day of September, 1994

/s/ D. Lowell Jensen
D. LOWELL JENSEN
United States District Court